Supreme Court of the United States.

October Term, 1901.

No. 293.

John Francis, Anthony Hoff and John Edgar,

Petitioners,

vs.

The United States of America,

Respondent.

...CRIMINAL...

Memorandum Brief for Oral Argument.

Statement of the Case.

The petitioners, John Francis, Anthony Hoff and John Edgar, together with Charles W. Reilley, who has since died, were convicted at the February Term, 1900, of the District Court of the United States, within and for the Southern District of Ohio, Western Division, upon an indictment presented and returned in said Court, in which they were charged with violating Section 5540 of the Revised Statutes of the United

States, which in terms makes it a crime to conspire to commit an offense against the United States.

The overt act, which they were charged with having conspired to commit, was the alleged causing to be carried from one state to another, to-wit; from Newport, Kentucky, to Cincinnati, Ohio, papers, certificates and instruments purporting to be and to represent tickets, chances, shares and interests in, and dependent upon the event of lottery and similar enterprise offering prizes dependent upon lot or chance.

Upon conviction, sentences were pronounced against said petitioners, and thereafter said petitioners duly prosecuted error to the Circuit Court of Appeals, for the Sixth Circuit, and upon submission of said cause and writ of error to said Circuit Court of Appeals, the judgment of said District Court was affirmed.

The Act of March 2, 1895,

The overt act charged as criminal, was allleged to be such because it was a violation, as was charged, of the first section of the Act of March 2, 1895, which is as follows:

Chapter 191. An act for the suppression of lottery traffic through national and interstate commerce and the postal service, subject to the jurisdiction and the laws of the United States.

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, or deposited in or carried by the mails of the United States, or carried from one state to another in the United States, any paper, certificate or instrument, purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so called gift concert or similar enterprise, offering prizes dependent on lot or chance, or shall cause any advertisement of such lottery, so-called gift concert or similar

> enterprise, offering prizes dependant upon lot or chance, to be brought into the United States, or deposited in or carried by the mails of the United States, or transferred from one state to another in the same, shall be punishable in the first offense by imprisonment for not more than two years, or by a fine of not more than one thousand dollars, or both, and in the second and after offense by such imprisonment only."

The validity of the first section of the act just cited, was called in question during the trial by the several motions to quash and motions to acquit, and after verdict by motions in arrest of judgment.

Proper exceptions to the rulings of the court thereon were duly taken and reserved, and were fully set forth and indicated in their certain bills of exceptions, and were distinctly and accurately noted and alleged in said petition for a writ of error and said assignment of error, and the question of the validity of said act of March 2, 1895, is again now respectfully presented and urged upon the consideration of this Honorable Court.

The petition for the allowance of a writ of certiorari having been heretofore granted, the entire case is now before this Court for examination and review.

As stated by Mr. Justice Brown in the opinion of this Court, delivered in Panama Railroad *v.* Napier Shipping Company, 166 U. S., at page 284.

> "But while the Court of Appeals may have been limited on the second appeal to questions arising upon the amount of damages, no such limitations applies to this Court, when in the exercise of its supervisory jurisdiction it issues a writ of certiorari to bring up the whole record. Upon such writ the entire case is before us for examination."

CHAMPION *v.* AMES, distinguished.

Before proceeding to discuss the record in this case, it is well to bear in mind that the case presented upon this record differs in many aspects from the record in the case of Charles F. Champion *v.* John C. Ames, United States Marshal, assigned for argument with this case; the distinction, however, between the two cases being one that can most properly be suggested when we come to discuss the sufficiency of the indictment under which the petitioners herein were prosecuted and convicted.

The question of the validity of the first section of the Act of March 2, 1895 is involved alike in each case. The means of transportation from one state to another of the so-called "papers, certificates and instruments purporting to be and representing tickets, chances, shares and interests in, and dependent upon the event of a lottery thereafter to take place, offering prizes dependent upon lot and chance etc." was, in the former case, The Wells, Fargo Express Company, a corporation, etc., while in the latter it is charged that the defendants conspired together "to cause to be carried from one state to another in the United States, to-wit: from the City of Newport in the State of Kentucky, to the City of Cincinnati, in the State of Ohio, papers, certificates and instruments purporting to be and to represent tickets, chances, shares and interests in and dependent upon the event of a lottery and similar enterprise, offering prizes dependent upon lot and chance, etc."; the carrying or transportation being, according to the record, by the individual and not by express or other instrumentality, and the 'papers, certificates and instruments" carried, being slips of paper, upon which were written in lead pencil certain numbers and figures, but which contained no other token of ownership, character, object, value or design.

We propose to discuss the questions arising upon the record in this case in the following order:

First: *Is the first section of the Act of March 2, 1895, a valid act?*

Second: *If valid, is the indictment sufficient in form and substance to warrant any conviction had under it?*

Third: *If so, do the record facts sustain such conviction?*

It is claimed, and of course evident, that the validity of the act in question can only be sustained as a regulation of commerce "among the several states" under the powers conferred upon Congress by the Constitution, as embraced in paragraph 3, section 8, article 1, thereof.

The act by its title is not in terms declaratory of a regulation of commerce but the suppression of an evil.

A proper presentation of the argument upon the validity of this act cannot, we think, be made, without preliminary thereto, we ascertain and adopt the most comprehensive, and at the same time the most authoritative deffinition of the term "commerce."

This can be most readily accomplished by accepting the definition of "commerce" given by Chief Justice Marshall in the very early case of Gibbons *v.* Ogden, 9 Wheat., 1, which is:

> "Commerce, undoubtedly is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

In the case of the United States *v.* E. C. Knight Company, 156 U. S., 1–12, we find in the opinion of Chief Justice Fuller that the definition given to commerce by Chief Justice Marshall is adopted and approved as follows:

> " 'Commerce, undoubtedly, is traffic,' said Chief Justice Marshall, 'but it is something more; it is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse.' That which belongs to commerce is within the jurisdiction of the United States, but that which does not belong to commerce is within the jurisdiction of the police power of the state. " Citing ;
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> Gibbons *v.* Ogden, 9 Wheat., 1—189—210.
> Brown *v.* Maryland, 12 Wheat., 419—448.
> The Licence cases, 5 How., 204—599.
> Mobile *v.* Kimball, 102 U. S., 691.
> Bowman *v.* Chicago and N. & W. Railway, 125 U. S., 465.
> Leisy *v.* Hardin, 135 U. S., 100.
> In re Rahrer, 140 U. S., 545, 555.

And at page 12 of the same opinion the Chief Justice continues :

> "It is vital that the independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the states as required by our dual form of government ; and acknowledged evils, however grave and urgent they may appear to be, had better ce borne than the risk be run, in an effort to suppress them, of more serious consequences by report to expedients of even doubtful constitutionality."

And says again with apparent emphasis :

"The regulation of commerce applies to subjects of commerce and not to matters of internal police."

Another rule of construction and interpretation by which we are to be guided in this discussion is found in the language of this Court in the case of Minnesota *v.* Barber, 136 U. S., 313;

> "In whatever language a statute may be framed, its purpose must be determinod by its natural and reasonable effect, and the presumption that it was enacted in good faith, for the purpose expressed in the title, cannot control the determination of the question whether it is or is not repugnant to the constitution of the United States."

In line with this authority and announcing the same rule of construction, are the following:

City of New York *v.* Miln, 11 Pet., 103.
Passenger cases, 7 How., 283.
Henierson *v.* Wickham, 92 U. S., 259.
U. S. *v.* Fox, 95 U. S., 370.
Yick Wo. *v.* Hopkins, 118 U. S., 356.
Morgan Rd. *v.* Lousiana, 118 U. S., 455, 462.

Another cardinal rule in the interpretation of the Act of March 2, 1895, may also be found in the opinion of Chief Justice Marshall in the case of Gibbons *v.* Ogden, wherein he says:

> "What is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in

> Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution."

This forcible language is repeated by Chief Justice Fuller in the case of Leisey *v.* Hardin, 135 U. S.. 100-108:

Having in mind, therefore at all times the rules by which in our judgment, a proper construction and interpretation of this act of March 2, 1895, is to be determined we contend that there are but two interpretations of the words of the Constitution, "*carried from one state to another in the United States*," namely:

First—*That the act of carrying an article must be in furtherance of some commercial transaction, otherwise Congress would have no power under the commerce clause of the Constitution or otherwise, to make such act of carriage or transportation from one state to another, a crime; and,*

Second—*The article carried must be a recognized article of commerce, otherwise if the article has ceased to be such, Congress no longer has any power over it.*

Upon the first proposition it must be apparent from even a superficial reading of the act of March 2, 1895, that the transportation of any article from one state to another, whether it be by railroad, express company or other common carrier, or by any other instrumentality, save and except the mails, cannot in the light of the definition of commerce or of the rule prescribed for the regulation thereof, be within the power of Congress to control, *unless the object and purpose of the transportation from state to state be incidental to or connected with commercial intercourse*, for, if the language of the statute is read literally, it would be a crime for an individual, with no purpose or intent to traffic in the same, to carry the prescribed lottery ticket from Cincinnati, in the state of Ohio to Newport, in the state of Kentucky.

As illustrating the force of this suggestion, we do not believe that if a person who has ever so innocently come into the possession of out and out lottery tickets, with every badge to identify them as such, should either personally carry them, or by direction of another, cause them to be carried from one of the states named to the other, for the purpose of having them destroyed, could commit a crime, and yet read literally the statute would make it such. It must be certainly apparent that such an act upon the part of an individual, could not in any other way be construed or distorted into either traffic or commercial intercourse. It would be the mere act of going from one city to another with a lottery ticket in his possession, with no intent on earth to dispose of it, but with the deliberate design to have it destroyed. Would it be possible to say that such a situation could have been, in any sense, within the contemplation of the framers of the Constitution when they enumerated the powers of Congress as affecting the regulation of commerce.

It is claimed on the part of the Attorney General, and so determined by the Circuit Court of Appeals in the decision of that court in this case, that the first section of the act of March 2, 1895, defines three separate and distinct offenses.

First—That it is an offense defined by the act for any person who shall cause to be brought within the United States from abroad, for the purpose of disposing of the same, any paper, certificate or instrument purporting to be or to represent, a ticket, chance, share or interest in or dependent upon the event of a lottery or similar enterprise, offering prizes dependent upon lot or chance.

Second—That it shall be an offense for any person to deposit in, or caused to be carried by the mails of the United States any such paper, certificate or iustrument, etc.

Third—That it shall be an offense for any person to carry or cause to be carried from one state to another in the United States any such paper, certificate or instrument, etc.

If this interpretation is to be given to the statute, and the second and third or not to be qualified by the language "for the purpose of disposing of the same," then the third offense so claimed to be described in this act fails utterly to comprehend within the language used, the design or purpose of barter, sale, exchange or commercial intercourse, and leaves such an offense to be the mere act of carrying the thing described, from one state to another, by the individual, or by another under his direction; a condition over which, we contend, Congress has no control, for if it lacks the ingredient of commerce, however defined, it put the case beyond the power of Congress to regulate.

We have never heard it contended that the third offense, thus indicated by the segregation of the statute, is so qualified by the language preceding it, nor is there anything in the statute following the language descriptive of the third offense which, distinctly, or by implication, could bring it within the pale of a commercial transaction. There is no rule of interpretation or construction of a statute, which we are aware of, which will permit a state of facts to be distorted into the commission of a crime, by the interpolation of words not in the statute. *Criminal statutes are to be strictly construed.*

We believe that congress, under its delegated power as to commerce, has the right to proscribe against certain articles or things and make the commerce or traffic in such things, by transporting them from one state to another, an offense against its laws. We insist, however, that there must always be an act of commercial intercourse in the process of that transportation from state to state to give Congress the power to either proscribe against it or regulate it. Congress would certainly have no power to prohibit a citizen of one state going into another for purely social purposes. It is only when that individual undertakes to engage in interstate commerce that his act falls within the regulations that Congress may prescribe.

There is no state in the Union, that were aware of, which has not adopted or enacted prohibitive constitutional provision or legislative enactment against lotteries. There is no state in the Union, that we are aware of, where a contract made for the purchase or sale of lottery tickets could be enforced; and everywhere it has been enacted that engaging in any game of chance, whereby anything of value is wagered, is gambling. Gambling never was and never can be said to be commerce. *The record in this case, if it makes out anything, makes out a case of interstate gambling, and not interstate commerce.*

> "The protection of the Constitution does not extend to lotteries, games of chance, or speculation. These may be interstate gambling, but are not commerce."

Prentice & Egan on Commerce Clause of the Federal Constitution, page 55.

> "A state may prohibit buying or selling what are commonly known as futures."
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> Fortenbery *v.* State, 47 Ark., 188.
> Alexander *v.* State, 86 Geo., 246.

> "A state may prohibit the sale of lottery tickets or of bonds containing conditions which make their value dependent upon chance."
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> Ballock *v.* State of Maryland, 73 Maryland, 1.
> Roselle *v.* McAuliffe, 39 Southwestern, (Mo.) 274.

> "A state may prohibit the sale of pools on horse races conducted without the state, although not forbidden as to races conducted within the state.
>
> State *v.* Stripling, 113 Ala., 130.

> "And may forbid the sending of money without the state for gambling purposes."
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> Lacey *v.* Palmer, 93 Va., 159.
> State *v.* Harbourne, 40 Atlantic Reporter, (Conn.) 179.

In order to illustrate the extremity of the argument which must be indulged in by the Attorney General to sustain his contention in support of the validity of this statute, it is not improper, we think, to suggest what might be termed an extreme case, and yet one, we think, that, if the statute be literally construed, would fall within the third offense claimed to be defined by this act. If a man purchased a lottery ticket in the City of Newport, Kentucky, and place the same in his valise, and carry the same over the bridge to the City of Cincinnati, in the State of Ohio, with the intent solely of retaining posession of it to await the result of the lottery, he would nevertheless have committed a crime, if the Attorney General is correct.

It is our contention, gathered from the history of the commerce clause of the Constitution, from the introduction of the original resolution in the convention of 1787 by Edmund Randolph, and from the opinions of this Court in construing it, and in determining its application, that it was intended by the framers of the Constitution to clothe Congress with the power at all times to pass appropriate legislation to prevent burdensome, conflicting or discriminating state legislation in the matter of interstate commerce, and that it was never intended, nor do we interpret any decision upon the subject to hold that the commerce clause of the Constitution granted any such power to Congress as is claimed in this case by the Government, namely, to suppress interstate gambling. It was intended, in our judgment, that Congress should at all times have supervisory power over interstate commerce; to equalize, to level and to protect interstate commerce from unjust state discrimination or burdens, by proper Governmental regulation. It was never, in our judgment, the intention of the framers of the Constitution to empower Congress by this clause to regulate the morals of the citizens of the various states.

It is repeatedly contended by the Assistant Attorney General, in his belief, that the act of March 2, 1895, was passed

for the purpose of protecting legitimate commerce; that the transportation of lottery matter by other instrumentalities than the mails affected injuriously interstate commerce, and that it was detrimental to such commerce. We fail to observe how the transportation of lottery tickets can in any way be properly said to contaminate, obstruct or otherwise affect interstate commerce in other merchantable commodities. It does not intermingle so as to contaminate or defile, nor can it in any way impede, hinder or delay legitimate commerce. It relieves commerce from no burden, facilitates it in no way, and commerce, both foreign and interstate, would proceed after its enactment precisely as before.

Unless the mere transportation or carriage in any way, for any purpose, of any tangible thing across the boundary line separating two states is commerce, this statute can not be successfully defended.

> "The power conferred upon Congress by the commerce clause of the Constitution is exclusive so far as it relates to matters within its purview which are national in their character, and admit or require uniformity of regulation affecting all the states. That clause was adopted in order to secure such uniformity against discriminating state legislation." (County of Mobile *v.* Kimball, 102 U. S., 691).

Upon the subject of our second contention, namely, *that the article carried must be a recognized article of commerce, otherwise, if the article has ceased to be such, Congress no longer has any power over it*, we pass to a consideration of the authority which Congress possesses, to define, by legislation, what shall or shall not be articles of commerce.

In the consideration of this question we are at once confronted with the construction which was intended by the makers of the Constitution to be placed upon the twenty-one words composing this clause of the Constitution. It would

not, of course, be proper, in undertaking to interpret a section or paragraph of the Constitution, to limit its interpretation and application to such purposes or things then in existence, but by all fair means of interpretation rather to include everything which might come, by the lapse of time, to be fairly within the language employed.

> "There comes a time in the interpretation of a written Constitution when the rules, which are applied to other instruments, are no longer the only guides to its interpretation; a time when its history is of more importance than its origin; when the intention with which it was framed and adopted can no longer alone control in its application." (Prentice & Egan on the Commerce Clause of the Federal Constitution, page 36).

The counsel for the Government insist in their brief that lotteries and lottery tickets and all things incidental thereto are fairly contemplated by the commerce clause, because prior to, and for some years subsequent to the adoption of the Constitution in 1787, lotteries had been resorted to both by the Government and by individuals for various laudable purposes. We contend, on the other hand, that the lotteries and all things incident thereto have long since ceased to be articles of commerce. They rest today under the ban of repressive and prohibitive constitutional provision or legislative enactment in every state of the Union. Contracts affecting them are not enforcible in any court of law or equity in any state in the Union. While the existence of lotteries may have been known to those who helped make the Constitution what it is, it is perhaps enough to say that the business, so-called, of lotteries is just as much a thing of the past as the institution of slavery. It is our contention that whenever any article has ceased to be an article of commerce it is not and can not be treated as such. Lotteries and all things incident thereto have become obnoxious to the moral sense of the communities in every state of the Union; have fallen into the category of

subjects which belong to the police power of the several states and are no longer subject to the control of Congress as *articles of commerce*.

As an apt illustration of the contention we make, that there could be no commercial intercourse in lottery tickets, so-called, at the time of the passage of this law, March 2, 1895, because lottery tickets had ceased to be such, we may use the example afforded by the attempted traffic in counterfeit money.

Certainly no one will contend that counterfeit treasury notes could in any way or by any force of reasoning, logic or argument be included within any definition of "articles of commerce." Suppose, therefore, that a man so disposed, in the city of New York, and having in his possession a quantity of counterfeit bills, should offer them for sale to a citizen of Ohio, and the Ohio citizen was frail or susceptible enough to send a hundred dollars to the New York man, who in return would cause to be transported by an express company twenty thousand dollars of counterfeit bills. Could such a transaction be said to be an act of commerce? It might be said in reply that Congress could restrain or prohibit the distribution, transportation or dissemination of counterfeit bills by any means whatever, but it would do so, not under its delegated power to regulate commerce, but under the power granted it by the Constitution "to provide for the punishment of counterfeiting the securities and current coin of the United States." (Par. 6, Sec. 8, Art. 1—Court).

So, in regulating "commerce with the Indian Tribes," Congress has the power to perscribe, as incidental to the power to regulate, what merchantable articles shall or shall not enter into that commerce. It is under this power that spirituous liquors are proscribed. So also of obscene literature imported from abroad. But it is always because such things are articles of commerce and not that the acts passed by Congress in relation thereto are attempts to regulate morals by the assumption of police power. Illustrations of this kind might be

multiplied *ad libitum ;* yet, are we not at least confronted with the proposition,that in order to invest Congress with the power to legislate, it must be an act done in furtherance of commercial intercourse, concerning things recognized as articles of commerce ?

Our contention that lottery tickets cannot in any sense be held to be legitimate articles of commerce is verified.we think, by the decision of this Court in *Douglass v. Kentucky*, 168 U. S., 458, wherein it is held that a lottery grant is not in any sense a contract within the meaning of the constitution, but simply a gratuity, a license, which the state under its police power, and for the protection of the public morals, can at any time revoke. The Constitution of Kentucky of 1891, forbidding lotteries and gift enterprises, and revoking all lottery privileges or charters theretofore granted, was held not to be inconsistent with the contract clause of the Constitution of the United States, thereby clearly placing the regulation of lotteries within the exclusive domain of state legislation.

We are disposed to regard the language of Justice Harlan in delivering the opinion of this Court in *Douglass v. Kentucky*, at page 496, as verifying our contention that the police power to regulate injurious practices affecting the morals and welfare of its citizens is peculiarly, if not exclusively, within the police power of the state, and not one to be exercised by Congress.

> "Is a state forbidden by the supreme law of the land from protecting its people at all times from practices which it conceives to be attended by such ruinous results ? Can the legislature of a state contract away its power to establish such regulations as are reasonably necessary from time to time to protect the public morals against the evils of lottery?"

This act of March 2, 1895, by its very title does not propose to regulate commerce, but to suppress lottery traffic. It is manifetsly, therefore, not an effort upon the part of Congress to place restrictions upon commerce by any species of regu-

lation but it is a deliberate declatory enactment by Congress to regulate the morals of the people by the suppression of an evil which Congress has conceived to exist.

In upholding the validity of the clause of the Kentucky Constitution in question, Justice Harlan cites with approval the language of Chief Justice Waite in the case of *Stone v. Mississippi*, 101 U. S., 824, as follows:

> "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself."

Again, referring to lotteries:

> "They disturbe the checks and balances of a well ordered community. Society built on such a foundation would almost of necessity bring forth a population of speculators and gamblers, living on the expectation of what, 'by casting of lots or lot, chance or otherwise,' might be 'awarded' to them from the accumulation of others. Certainly the right to suppress is governmental, to be exercised at all times by those in power at their discretion. Anyone, therefore, who accepts a lottery charter does so with the implied understanding that the people in their sovereign capacity, and through their properly constituted agencies may resume it at any time when the public good shall require, whether it be paid or not."

We understand this language to emphasize the declaration that the states of the Union are at all times clothed with the exclusive power to suppress and prevent by proper legislation, at any time that they see fit, at their discretion, acts or

things affecting the morals or welfare of the communities of the several states, and that the supression of lotteries is declared to be within the category of subjects to be controlled by state legislation.

If what we contend for in regard to lottery tickets is true, how much more forceful does the argument bear upon "lottery advertisements," the subject of the concluding paragraph of Section 1, of the act in question. Can there, in the nature of things, be any "commercial intercourse" in advertisements?

Insufficiency of Indictment.

In presenting this question, we beg leave to submit such arguments as we feel flow naturally from an analysis of the act, by the segregation claimed for it, into three separate and distinct offenses, the relation which the second section bears to prior enactments of Congress on the same subject, specially exempted from repeal, and the total failure to plead in the indictment, facts sufficent to constitute any offense under this act, if valid.

Section 1 of the act reads as follows: "That any person who shall cause to be brought within the United States from abroad for the purpose of disposing of the same or deposit in or carry by mails of the United States, or carry from one State to another in the United States any paper, certificate or instrument purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of lottery, so-called gift concert or similar enterprise offering prizes dependent upon lot or chance, or shall cause any advertisement of such lottery, so-called gift concert or similar enterprise offering prizes dependent upon lot or chance, to be brought into the United States or transfer from one State to another of the same, shall be punished in the first offense by imprisonment for not more than two years or by a fine of not more then one thousand dollars, or both, and in the second and after offenses by such imprisoment only.

Second, That nothing herein contained shall be deemed to repeal by implication sections thirty-eight hundred and ninety-four, thirty nine hundred and twenty-nine, or forty hundred and forty-one of the United States Revised Statutes, or any part thereof, nor any provision of the Act of Congress of April 29, 1878, entitled, "An act to prevent the sale of policy or lottery tickets in the District of Columbia," nor any provision of the act of Congress September 19, 1890, entitled "An act to amend certain sections of the Revised Statutes relating to lotteries, and for other purposes," nor any provision of the laws whatsoever against the establishment of lotteries, or games, or other schemes, or prizes, or chances, or the traffic in or circulation of tickets and other such papers or instruments of the publication of advertisements or notices in any wise relating thereto."

The statutes, which are expressly retained in force by the provisions of the second section of this act, as above quoted, so far as they relate to the mailing and circulating of lottery tickets, advertisements, etc., are as follows:

Section 3894. No letter or circular concerning illegal lotteries, so-called gift concerts, or other similar enterprises, offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses, shall be carried in the mail. Any person who shall knowingly deposit or send anything to be conveyed by mail in violation of this section shall be punished by fine of not more than five hundred dollars, nor less than one hundred dollars, with costs of prosecution.

By an amendment passed July 12, 1876, the word "illegal" was struck out of the first line of the section above quoted.

Section 3929 authorizes the Postmaster General to cause all registered letters sent through the mail to be branded as fraudulent and returned to the sender when he is satisfied that they relate to fraudulent lotteries or other schemes or devices for obtaining money by false or fraudulent pretenses, and Sec-

tion 4041 forbids the payment of any postal or money order under substantially the same circumstances as set forth in 3929 and authorizes their return to the sender.

The Act of September 19, 1890, is as follows:

Be it enacted, etc., that Section 3894 of the Revised Statute be, and the same is, hereby amended to read as follows:

Section 3894. No letter, postal card, or circular, concerning any lottery, so called gift concert of other similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretenses, and no list of the drawings at any lottery or similar scheme, and no lottery ticket or part thereof, and no check, draft, bill, money, postal note or money order for the purchase of any ticket, tickets or part thereof, or of any share or any chance in any such lottery or gift enterprise, shall be carried in the mail or delivered at or through any postoffice or branch thereof or by any letter carrier.

Nor shall any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lotteries or gift enterprise, whether said list is of any part or of all of the drawings, be carried in the mail or delivered by any postmaster or letter carrier.

Any person who shall deposit or cause to be deposited or shall knowingly send or cause to be sent, anything to be conveyed or delivered by mail in violation of this section, or who shall knowingly cause to be delivered by mail, any thing herein forbidden to be carried by mail shall be deemed guilty of a misdemeanor, and on conviction shall be punished by a fine of not more than five hundred dollars or by imprisoment for not more than one year, or by both such fine and imprisonment for each offense.

The tariff act of August 28, 1894, prohibits the importation into this country of "any lottery ticket or any advertisement

of any lottery," but it provides for no punishment except the forfeiture of the articles themselves.

The question, therefore, presents itself whether the Act of March 2, 1895, applies to any lottery ticket or lottery advertisement except such as shall be brought into this country from abroad for the purpose of being sold, or deposited in or carried in the mails or carried from one state to another. The act is very imperfectly drawn, and its construction is, for that reason, not by any means free from difficulty. According to the most reasonable construction of the first clause of the Act, its purpose was to prohibit the bringing of lottery tickets into this country from abroad for the purpose of disposing of them or for the purpose of depositing them in the mails of the United States, or for the purpose of carrying them from one state to another within the United States. In order to place any other construction upon it, the language employed must not only be disregarded to a certain extent, but it must be reconstructed in orderto make it grammatical and very important words must be interpolated—two things which can never be done in dealing with a highly penal statute. The act specifies the things which constitute the offense, all of which relate to the same tickets, that is, tickets brought into this country from abroad. If it had been intended to prohibit and punish, under this act, the depositing in the mails or the carrying from one state to another of lottery tickets of all kinds, domestic and foreign, the words "deposited in" etc., and the words "or carry from one State to another in the United States" would have been preceded by some appropriate language to show that they were disconnected from the original act of causing the tickets to be brought into the United States from abroad. If the statute, after the clause relating to the tickets brought into the United States, had said: "or any person who shall cause any lottery tickets" to be deposited in or carried by the mails in the United States, "or to be carried from one state to another within the United States", etc., the intention of Congress to embrace all lottery tickets, papers, etc., within

the provisions of the Act would have been clear, but no such words are used. To what tickets, therefore, do the words, "or deposit in," etc., and the words, "or carry from one state to another," refer? It seems clear that they must refer to such tickets only as have been brought within the United States from abroad. No other tickets are mentioned, either in the first or second clauses of the Act, or, at least, no other tickets are in express terms referred to in the Act.

It is the bringing of the prohibited tickets, advertisements, etc., or causing them to be brought into this country from abroad with the purpose or intent to dispose of them, or to cause them to be deposited in the mails, or to carry them from one state to another, that constitutes the offense defined and punished in this Act, and the offense is complete when they have been brought here with such intent or purpose. In a prosecution for any of these offenses, it would not be necessary to allege or prove that the accused had actually sold or disposed of the tickets, or had actually caused them to be deposited in the mails or carried from one state to another.

This view of the statute is greatly strengthened by reference to the previous legislation of Congress on the same general subject, which was not repealed by the Act of 1895. The punishment provided for a violation of the Act under consideration is imprisonment for not more than two years, or a fine not exceeding $1,000 or both, for the first offense, and imprisonment alone for the second and all subsequent offenses, whereas under the Act of September 19, 1890, which is expressly retained in force, the punishment is a fine of not more than $500 or imprisonment for not more than one year or both. If therefore, the Act of 1895, applies to all lottery tickets and all advertisements of lotteries, whether brought here from abroad or not, there are two statutes in force prescribing different punishments for precisely the same offense; but if the last act relates only to tickets, advertisements, etc., brought here from abroad, the legislation upon the subject is perfectly consistent. Persons depositing in the mails lottery

tickets and other prohibited papers brought here from abroad would be punished by a fine not exceeding $1,000, or imprisonment for a period not exceeding two years, or both, while persons depositing tickets brought into this country from abroad, would be punishable under the Act of September 19, 1890, by a fine not exceeding 500 or imprisonment for not more than one year, or both. The legislation for the exclusion of lottery tickets and advertisements generally from the mails, and for punishment of persons violating the laws relating to that subject, was complete before the Act of March 2, 1895, was passed, and Congress had also prohibited the importation of tickets and advertisements from abroad, but had not, up to that time prescribed any punishment except the forfeiture of the imported papers. All that remained to be done, therefore, was to provide for the punishment of persons who might bring here for sale, or circulation, foreign lottery tickets and advertisements, and this was done by the Act of 1895, which, as shown by its express terms, was not intended to repeal or to interfere in any manner with the execution of previous statutes. If this act embraces domestic lottery tickets and advertisements, then it is plainly irreconcilable with the prior laws on the same subject, and all of them cannot be enforced, thus showing that they were not intended to relate to the same offense.

In construing this statute we might look into the title and the language employed to ascertain what was the legislative intent.

Bishop, in his work on Statutory Crimes, lays this down a an elementary principle. See page 200 and cases there cited.

> "Persons can not be made subject to such statutes by implication. Only those which are included within them in both spirit and letter, and all doubts in such statute are to be resolved in favor of the accused."

See Bishop on Statutory Crimes, Sec. 194.

As said by Chief Justice Marshall in the case of the United States *v.* Wilkesburg, 5th Wheat., 76—96:

> "The determination that the case is within the intention of the statute does not authorize us to say so. It would be dangerous indeed to assert that the case, which is within the reason and limit of the statute, is within its purview so far as to the punishment of the crime not enumerated in the statute, because it is of greater atrocity, or of a kindred character with those which are enumerated. If this principle has ever been adopted, except in criminal law, it has been in cases of considerable irritation which it would be unsafe to consider as precedence"

The first question to which we desire to call attention, admitting for the sake of argument that the law in question, to-wit, the Act of March 2d, 1895, is constitutional, we nevertheless contend that the facts stated and the allegations contained in the indictment do not charge an offense prohibited by said enactment.

It is a well settled rule of criminal pleading that the indictment must contain each and every element constituting the crime necessary to be proven upon the trial in order to support a conviction.

See,

Anderson *v.* State, 7 O. S., 2 pt., 250.
Birnly *v.* State, 8 O. S., 1 pt., 230.
Lougee *v.* State, 11 O. R., 269.
Lamberton *v.* State, 11 O. R., 284.
Miller *v.* State, 3 O. S.
Cheadle *v.* State, 4 O. S.
Dillingham *v.* State, 5 O. S., 280.
Third portion of Opinion, Bishop's Cr. Pro., p. 464.
Bishop on Crim. Pro., pp. 369, 370, 371.
Davis *v.* State, 19 R. S., 270.

Carper *v.* State, 27 O. S., 575.
Mackey *v.* State, 3 O. S., 362.
U. S. *v.* Cook, 17 Wall, 174.
U. S. *v.* Reese, 92 U. S., 225.
U. S. *v.* Cruikshank, 92 U. S., 558.

In construing this statute we may look into the title and the language employed to ascertain what was the legislative intent. Bishop, in his work on Statutory Crimes, so holds. See page 200 and cases there cited.

Therefore, taking this rule of interpretation, we find that the carrying was not intended by this statute to be made a crime, but there was another essential element which must be concomitant with the act of carrying, to-wit, for the purpose of disposing of the same. Let us look at the language employed and see if such is not the manifest purpose and intention of the act.

First, the title, "An act for the suppression of the lottery traffic through national and interstate commerce and the postal service subject to the jurisdiction of the laws of the United States." we shall contend that it never was the purpose of Congress to control the action of individuals in coming to and from the states. Therefore the language, "Be it enacted, etc., that any person who shall cause to be brought into this country from abroad for the purpose of disposing of the same" (so we see the legislative enactment up to this point has for its purpose the punishment of the persons who, by the act of carrying, have also the purpose in mind of disposing of the same), "or deposited in or carried by the mails of the United States or carried from one State to another" (making three distinct, substantive offenses) "any paper, certificates or instruments purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so called gift concert or similar enterprise offering prizes dependent upon lot or chance."

And we shall further contend, that having in possession a lottery ticket and going from one state to another would not make it an offense against this law, as it is manifest that it was the intention to make that penal which *pertained to the disposition of the same*, for the very first clause of the section, "that any person who shall cause to be brought within the United States from abroad for the purpose of disposing of the same," and coupling the act of bringing with the intention of disposing of the same, making both essential elements in order to constitute a crime.

We are of the opinion that the indictment should set forth the carrying for the purpose of disposing. We regard the purpose of disposing of as a material allegation, and the rule of criminal pleading is that the indictment must state every intent or action that constitutes the criminal design. It is the intent or purpose which gives character to the action and makes that criminal which would otherwise be exempt from guilt. In this proposition we are clearly supported by every elementary work on criminal law, and the following citations in point are submitted:

U. S. *v.* Cook, 17 Wall., 174.
Lougee *v.* State, 110 R., 69.
U. S. *v.* Rees, 92 U. S., 225.
Lamberton *v.* State, 11 O. R., 284.
U. S. *v.* Cruikshank, 92 U. S., 558.
Bishop on Crim. Pro., pt. 484.
Anderson *v.* State, 7 O. R., 2 pt., 250.
Birnly *v.* State, 8 O. R., 1 pt., 230.

In order to bring this indictment within the purview of this statute, it seems to us that it would be necessary to destroy that well recognized principle of the construction of criminal statute:

> *"No case is to be brought by construction within the statute unless it is completely within its words."*

See Bishop on Statutory Cr., p. 220.

Hawkins lays down the rule:

> "No parallel case which comes within the same mischief shall be construed to be within the purview of it (statute) unless it can be brought within the meaning of the word."

2 Hawkins P. C. Curw., 188, p. 16.

Therefore, if the case is fully within the mischief to be remedied, and is even of the same class and within the same reason as other cases enumerated, still, if not within the words, construction will not be permitted to bring it within the statute. See

Rex *v* Hammond, 2 East P. C., 1 Leach, 4 Ed. 444.
Leonard *v.* Bosworth, 4 Com., 421.
Hall *v.* State, 20 O., 7.
Rex. *v* Senior, 1 Leach, 4 Ed., 496, 2 East P. C., 993.
Melody *v.* Reab, 4 Mass., 471, 473.
Rex. *v.* Ellis, 8 D. & R., 175.
State *v.* Lovett, 3 Vt., 110.
Rex. *v.* Paddle, Russ & Ry., 484.
Carpenter *v.* People, 8 Bar., 603.
State *v.* Cooper, 16 Vt., 551.
Hamuel *v.* State, 5 Mo., 260.
Sharp's Case, 2 Lewin, 233.
Kyle *v.* State, 10 Ala., 256, 2 East P. C., 910.
Hawkins *v.* State, 3 Stew., p. 63.
State *v.* Smitherman, 1 Ire., 14.
Rex. *v.* Remmant, 5 T. R., 169.
Rex. *v.* Mellish, Russ & Ry., 80.
Rex. *v.* Turner, 8 Car & P., 756.
Reg. *v.* Scott, 3 Q. B., 543.
Campbell *v.* Com., 2 Rob., Va., 791.

State *v.* Curtis, 5 Hum., 601.
Com. *v.* Barrett, 9 Leigh, 666.

There is another well settled principal of law, to-wit: Do the words used as explanatory of the offense charged bring it fairly within the language of the statute? If not, a crime is not charged, and the indictment is defective.

See

Bishop Cr. Pro., p. 108.
Hagar *v.* State, 25 O. S., 268.
Wilson *v.* State, 34 O. S. 204.
Wharton Crim. Law. pp. 81–82.
Murphy *v.* State, 28 Miss., 637.
Norris *v.* State, 33 Miss., 373.
Newcomb *v.* State, 37 Miss., 383.
Bishop Crim. Pro., Vol. 1, 403-404.

It is generally a good rule in indictments that the special manner of the whole fact ought to be set forth with such certainty that it may judicially appear to the Court that the indictors have not gone upon record.

See

Hawkins P. C., 25 pp. 57.

In the case of the United States *v.* Mills, 7 Peters, 142, the Court says:

> "This constitutional right was construed to mean that the indictment must set forth the offense with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged."

The same rule is laid down in U. S. *v.* Cook, 17 Wallace, 174, in which the Court says:

> "Every ingredient of which the offense is composed must be accurately and clearly charged."

The same is held in Cruikshank *v.* U. S., Vol. 92, pages 557, 558.

By our criminal law the accused cannot obtain a new trial upon the ground that if he had more accurately known the offense with which he was charged he could have satisfactorily established his innocence; hence, particularity in the indictment is therefore required and the absence of material element of the crime makes the indictment fatally defective. This precaution and precision in pleading is also necessary in order that the defendant may know what crime he is called upon to answer and that the court may see that a definite offense appears upon the record to pronounce the judgment and award the punishment which the law prescribed.

See

U. S. *v.* Cook, 17 Wall., 174.
U. S. *v.* Reese, 92 U. S., 225.
U. S. *v.* Cruikshank, 92 U. S., 558.
Com. *v.* Dean, 109 Mass., 352.
Com. *v.* Blood, 4 Gray, 31.
Com. *v.* Phelps, 11 Gray, 73.
Com. *v.* Burke; 14 Gray, 81.

The criminal nature of the offense is a construction of law from the facts and circumstances of the case. The indictment, therefore, should set out precisely all the facts and circumstances which render the defendant guilty of the offense charged, otherwise the law relating from the facts would be a question of fact for the jury.

Lord Mansfield lays down the rule that every crime ought to appear on the record with scrupulous certainty. Therefore, the language in this indictment is, in our judgment, wholly insufficient. See

Rex. *v.* White, Cald., 187.
Rex. *v.* Marshall, 1 Moody C. C., 158.

"Did feloniously conspire together with one another to commit an offense against the United States, to wit: to cause to be carried from one state to another in the United States, to-wit, from the City of Newport in the State of Kentucky, to the City of Cincinnati in the State of Ohio, papers, certificates and instruments purporting to be or represent, as they then and there well knew, lottery tickets, chances, shares or interest in a game dependent upon the event of a lottery or similar enterprise offering prizes dependent upon lot or chance." That the tickets was issued as a chance upon a lottery is an essential element; therefore the defendant should be advised in the indictment as to what lottery, where the lottery, when the lottery, in what manner the lottery was to have been conducted, and there should be proof that a lottery was conducted. Every material element that was necessary to be proven upon the trial should be alleged in the indictment, otherwise the same is fatally defective.

The indictment does not set forth any prizes. If it is clear that they have a right to interpret the figures in the indictment that they have a significance and meaning, such are alleged by way of innuendo, otherwise the defendant is not advised. The mere conclusion of law in the indictment is not sufficient.

It is a well settled principle in the construction of criminal statutes that it must be a strict construction, that nothing shall be taken by way of intendment; unless the matter alleged falls within the strict and literal interpretation of the statute it must be excluded, or in other words it cannot be included.

As we take the act of March 2, 1895, it was intended to reach a class of persons who might cause to be brought tickets, etc, *from abroad* for the purpose of *disposing* of the same. The mere possession of such tickets, etc., was not made a crime. The gist of the offense was the criminal possession for the purpose of disposing of the same.

Who did he procure to carry should be alleged. Every element that is necessary to prove should be alleged.

No allegation as to where the lottery, when the lottery, or what the lottery, or what the prize, etc.

Any paper, certificate or instrument purporting to be or represent a ticket, etc. What interest does the letter or figures mentioned in the indictment purport?

To purport is to intend, to show; it must be manifest, it must be apparent.

There is no innuendo or allegation or setting forth of any fact which would justify a conclusion of law.

What figures represent a chance, etc.?

"And did represent various combinations of numbers selected by one H. T. Harrison and other players and persons to the grand jurors unknown."

It is not alleged that this defendant was aware of that fact.

What chance, what interest in what lottery did H. T. Harrison have a claim, etc.?

The descriptive part of the statute makes it a crime to deal in schemes of chance depending upon lot or chance. How then can such a paper ticket or whatever it may be called be recognized other than as a gambling scheme.

CHANCE

An event which happens without any assigned cause.

LOT.

That may be as-igned, designated or set over; not necessarily dependent upon chance.

The Court Erred in refusing respective requests of Defendants that they should go acquit at the close of the testimony for the Government.

We need cite no authority upon the proposition that the Government must prove the charges as laid in the indictment, and the venue becomes a material part thereof.

The Constitution of the United States in Art. 3, Section 2, provides.

> "That a person must be tried in the State where the crime has been committed, but *when not committed within any State* the trial shall be at such place or places as the Congress may by law direct."

Article 15 of the Constitution provides:

> "That in all orginal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, etc."

The offense charged in this indictment is a conspiracy under Section 5440, Revised Statutes; that is, having conspired to do an unlawful act against the United States, and any one or more of such parties do any act to effect the object of conspiracy, all of the parties shall be guilty of the offense.

There is no sufficient proof that an offense was committed in the district as laid in the indictment. There is not sufficient proof that the defendants or either of them entered into a conspiracy, as alleged in indictment.

In the case of the United States *vs.* Warner 17, Fed R., 145, it is held that a conspiracy is an agreement between two or more by concerted actions to do some unlawful act. *There should be proof that the act was done by concerted action as between the parties of this indictment*, for a criminal conspiracy consists not mainly in the intention of the two or more to do an unlawful act, but it must be proven beyond a reasonable doubt that there was an agreement by concerted action to do the particular unlawful act complained of.

See,

Russell on Crimes, Section 116.
1 Wharton Crim. Law, 3 Ed., 1342, etc.
2 Bishop's Crime. Law, 6 Ed., 186.

An agreement is an act in the advancement of the intent of each. See.

69 American Dec., 321.
Alderman vs. People, 4th Mich., 414.
U. S. vs. Johnston, 26 Fed. R., 682.

We submit that a conspiracy can not be established by imagination; there must be proof. Proof that persons may have engaged in an unlawful traffic or business does not establish an agreement to violate a law of the United States, and such grievances can only take place when it is a fair deduction of the proof adduced.

There is no better settled principle of law than that mere passive cognizance of fraud or the illegal actions of others is not sufficient to show conspiracy. In order to constitute this crime it is incumbent upon the Government to prove an active participation.

See,

Evans *v.* People, 90 Ill., 384.
Miles *v.* State, 58 Ala., 390.
Reg. *v.* Bang, 4 Fort & F., 389.
Comr. *v.* Barnsm, 132 Mass., 242.
U. S. *v.* Lamcost, 44 Fed. R., 896.
U. S. *v.* Johnson, 26 Fed. R., 682.
U. S. *v.* Newton, 52 Fed. R., 275.
Reg. *v.* Bolton, 12 Cox, 87.

We challenge the defendant to point to a single item of evidence showing participations as between either of the plaintiffs in error. It will be remembered that it is not sufficient to show that the parties were committing an act in violation of the laws of the United States; there must be a proof of a crime, of a concerted action; a joint action against the United States and some overt act in furtherance of this crime within the jurisdiction of the tribunal to give it jurisdiction.

See,

U. S. *v.* Miller, 3 Hughes, C. C., 553.
U. S. *v.* Donan, 11 Blatchford, C. C., 168.

Newman *v.* Jenkins, 26 Pa. St., 159.
U. S. *v.* Matthews, 29 Fed. R., 702.
U. S. *v.* Weston, 17 Fed. Rep., 145.
U. S. *v.* Barrett, 65 Fed. R., 62, 63.

There is not in all the proof a single item of testimony that Reilley ever spoke to Edgar; that Reilley had ever seen or talked with Hoff; or that either of the defendants ever knew or had any dealings with the other. The only paper writing offered in evidence, as a ticket, and claimed in the indictment to represent a ticket, was a paper made of numbers placed thereon by the man Harrison, claiming that it contained the numbers that he bet upon in the policy game, and if such numbers came out in the policy game he was a winner; if not, he was a loser.

That Reilley, Hoff, Edgar or Francis had anything to do with getting up that paper writing, it is not claimed.

If it was accepted as a bet, then it was not a ticket; if it was made by Harrison and not sold by Hoff, then the conspiracy alleged in the indictment falls to the ground.

For this reason alone we are of the opinion that for absolute want of proof to sustain any part of the indictment the judgment should be wholly set aside.

Error Claimed in the Admission of Testimony.

The testimony of A. L. France, as appears more fully on pages 40, 41, 42, 43, 44, 45 and 46 of the Record, was clearly incompetent. That a lottery business may have been carried on twenty-five or thirty years ago and then abandoned for a policy scheme and carried on by the witness up to a period of time about four years before the offense alleged against the defendants, was, in our judgment, incompetent evidence relating to, or affecting the defendants in this case.

The witness expressly states that he had no knowledge for a period of over four years of the policy business, either

directly or indirectly, whether the same was being carried on or not.

To claim that because it had been carried on four years before the alleged offense, was proof that it was still being carried on, we do not understand any rule of evidence that will support.

To say that the business that was at present carried on was a scheme practically like that which was carried four years ago, is an attempt to prove the defendants guilty by comparison, which we do not understand to be ever admissible as evidence.

Again, taking the rule as laid down by Caldwell, Judge, in Barton *v.* State, 18 O., pages 222 and 223:

> "It is never admissible to prove that a person has previously committed a crime of a similar character, to show that he committed the criminal act for which he is on trial."

But, in this case the evidence was not that the defendants had committed the act four years before, but forsooth, that somebody else had, to-wit, the witness, and that by an analogy, by his unlawful act committed four years ago, or circumstantial evidence would show that the defendants, or some of them, or some other people, were engaged in a scheme of like nature, we submit that the admission of such evidence is supported by no rule found anywhere in the law.

Again, on page 48 of the Record, in the testimony of Charles Pelton, it was clearly incompetent to have allowed the witness to state his conclusions, his findings, that is, the operation of his mind, without detailing the circumstances upon which he based them. For instance, on page 48 of the Record, as follows:

> "*Q.* You may state what is your source of knowledge with reference to Mr. Reilley being in the policy business.
>
> *A.* Personal observation. I speak from per-

sonal observation, every month of the five years, almost every week, seeing him at his appropriate place at certain hours, in the policy business, down to the last month."

(Counsel for the defendant moves the Court to strike out the whole answer of the witness; the Court overrules the motion, to which ruling of the Court counsel, for the defendants at the time excepted).

"*Q.* Do you know John Edgar?
"*A.* Yes, sir.
"*Q.* How long have you known him?
"*A.* Five years.
"*Q.* What is his business?
"*A.* He is a policy carrier from Newport; a canvasser of the books when they come in from the shops twice a day to headquarters over Mr. Rielley's shop.
"*Q.* Where is the headquarters?
"*A.* In the adjoining building to Mr. Rielley's shop; having connection up to last October through a hole in the brick wall; the only safe on the premises being in Mr. Reilley's shop.
"*Q.* How did they enter this room?
"*A.* They generally come into Mr. Reilley's first and the books were delivered there—I should not say that last, because I was not personally cognizant of that."

But there is perhaps another serious objection to all this testimony, and this question will be presented all along through the testimony, to-wit; that the acts and declarations of a conspirator can only be introduced after sufficient proof of the conspiracy as evidence against the alleged fellow conspirator, *and subject always to the limitation that the acts and declarations admitted be those only which were made and done during the pendency of the criminal enterprise and in furtherance of the common object.*

Where the acts are mere naratives of past occurences they cannot be received as evidence of such occurences. In order

to be competent testimony they must be concomitant with the particular act and connected with it so as to constitute a part of the *res gesta*.

See,

1st Greenleaf Ev., 140.
U. S. *v.* Goody, 12 Wheat., 460.
Am. Fr. Co., *v.* U. S., 2 Peters, 358.
Steatson *v.* Bank of N. O., 2 O. S., 167
Fauts *v.* State, 7 O. S., 471.
Closson *v.* State, 14 O. S., 234.
Rennaker *v.* State, 25 O. S.
Owens *v.* State, 46 O. S., 457.

No limitation is placed upon the evidence, its effect, its character or its weight as against the defendant John Edgar, John Francis, or Anthony Hoff; no limitation is made as to it in testimony.

Again, on page 50 of the Record, we find the Court admits testimony in answer to this question: "This ticket I hold in my hand is what?"

A. "It is a policy ticked from Henry Cutter's shop, on Vine street."

The Court permits the ticket to be shown in evidence for the purpose of illustrating what is meant by what the witness speaks of as "a ticket," clearly continuing the same rule of trial by comparison. But permitting it to stand in evidence that it was a ticket from the policy shop kept by Henry Cutter, on Vine street, this question of evidence is clearly prejudicial, and we do not think should be admitted.

Again, on page 52 of the Record, at the bottom of the page, commencing with the question: "When a man goes into a vendor's shop and buys or chooses three numbers and invests ten cents, what is done by the vendor?"

(Question objected to by counsel for defendants, the Court overrules the objection, to which ruling of the Court counsel for defendants at the time excepted.)

A. "In all the shops, with one exception, that I am acquainted with, the patron finds a shelf or table. with such pieces of paper as the blank paper; he makes out his ticket, writing the official number of the system at the top; if it is the system that is in this case, if he wanted to bet in the Kentucky part of it he would put a "K" at the top, then write his three or more numbers under it and the amount paid below that, and make a duplicate of it, one he hands in with his money and the other he retains so as to compare with the official print when he returns to see if he has won. There is nothing given by the agent."

This is still going on to show, by way of comparison, not any act that was done by the defendants, or either of them, not any act that was done during the pendency of the alleged criminal enterprise, or in furtherance of the common object, certainly such testimony should not be supported as a part of the *res gesta*, nor should it be claimed, under any circumstances, that it was an act concomitant with the principal act. It might be claimed that it was a wholesale way of describing how policy was played, but that was not the offense charged against the defendants in this case. The offense charged was that they had unlawfully conspired together in violation of Section 5440 of the Revised Statutes of the United States to carry tickets contrary to the provisions of the Statutes found in Vol. 8 of the United States Statutes at large, as we shall claim later on, this very testimony—if it counts for anything, if it was considered for any purpose—clearly shows, taken in connection with the testimony of France, a variance as between the proof and the allegations of this indictment.

Again, on page 53 of the Record, commencing with the question, "State what you know about Mr. Hoff in reference

to the policy game?" and on pages 54 and 55 the testimony relating to the defendant Hoff was clearly incompetent, at least it was incompetent as against the defendants Francis, Reilley and Edgar, yet no limitation was placed thereon.

Again, on page 55 of the Record, commencing with the second question thereon, and all of page 56 and down to the middle of page 57 of the Record was clearly incompetent in so far as the same related in any way to the defendant Francis.

The fact that the witness may have followed him from time to time to the place; that he undertook to describe who the other gentlemen were in the room as policy agents, etc., and that in August, 1898, a raid was made in the room and the door bursted open and three men found therein, and the statement that perhaps Mr. Francis could explain, etc., all of which testimony was clearly incompetent.

Again, on pages 57 and 58, none of these people mentioned and described were indicted, nor were the defendants, nor either of them, advised that their acts would be put in evidence, nor is it claimed that they were in any wise in a conspiracy.

Again, on pages 58 and 59, the same class of testimony is admitted, and particularly that part of it commencing about the middle of the page, describing where the official prints found in Reilley's place came from, it is all clearly incompetent.

Again, on page 61 of the Record, at the conclusion of the examination in chief, counsel for defendants moved the Court to rule out all the testimony relating to the tickets mentioned and described on pages 60 and 61 of the Record; there was no connection as between them and the defendants, or either of them, and we submit they should have been ruled out.

Again, in his cross-examination, on page 75, it is perfectly manifest that the witness knew nothing about the matter; that he was only testifying from information given him by

somebody else's surmises, and the whole of the cross-examination shows that he had no actual knowledge at all

Again, after hard struggling with this witness, on pages 79 and 80 in his re-examination, he absolutely swears that he has no knowledge of any lottery; that he never saw one; didn't know whether one existed now or ever had, and at this point we wish to say that the only evidence of a lottery in the case was the testimony of the witness Pelton, and for the want of such proof we shall claim that the prosecution must fail.

The testimony of Mr. Page, on pages 81, 82, 83 and 84, was clearly incompetent. What business the witness may have had with William C. Francis, Jr., & Co. had nothing to do with the case at bar.

The testimony of Mr. Everett, on page 90 of the Record, was clearly incompetent. The description of the man who paid him the rent, how often he paid him, etc., not being the act of the defendants or either of them, was clearly incompetent, and the Court should have sustained the motion of the counsel for the defendants below to rule out all of the testimony of said witness.

On page 93 of the Record the question is put: "When, if at any time, did you receive word whether the play you made was successful or not?" The question is objected to, and the objection overruled, and on page 94 the witness goes on to say: "I received word from Mr. Hoff the next day." As before argued and presented in full, if the offense charged was the carrying of certain things alleged in the indictment on the 4th day of October, after the offense committed as alleged in the indictment, any act of either party would be narrative of a past offense, and therefore clearly incompetent and prejudicial error as against the other defendants, and the jury should have been so instructed.

As we shall claim further along, the testimony of Mr. Harrison on pages 91 to 97 demonstrates beyond all question that

the case does not fall within the inhibition of the Act of March 2, 1895, Vol. 8, page of the Revised Statutes of the United States.

The witness explains on page 97, in answer to the question by the Court, "What did you do, and what did Mr. Hoff do upon the morning of the fourth?"—

> "*A.* Well, I left a play with Mr. Hoff.
> "The Court: Tell what you did. Don't give any conclusions.
> "*A.* Well, I played with Mr. Hoff. I made a duplicate play with Mr. Hoff on the morning of the fourth. I retained one-half and left the other with him."

And so on following down to page 98, when the question is asked, "Upon that morning when you handed Mr. Hoff the play, what else, if anything, did you hand him?" and following on with all those questions and answers relative to the paper upon which the duplicate ticket was made, etc., to all of which questions and answers the defendants by their counsel objected; the objection was overruled, and the counsel for defendants at the time excepted.

Clearly, then, if we understand the purport of the evidence given, it takes this case out of any fair construction of the Act of March 2, 1895, "That any person who shall cause to be brought into the United States from abroad for the purpose of disposing of the same, or deposit in or carry by the mails of the United States, or carry from one state to another in the United States any paper, certificate or instrument purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery, so-called gift concert or like enterprise offering prizes dependent upon lot or chance," the witness swears that Hoff was a policy vendor; that he (Harrison) made a bet with Hoff, and that he (Harrison) placed three numbers upon a piece of paper; that he duplicated those three numbers, retaining the second copy, and gave the original to Hoff as a memoranda of his play. Tak-

ing the testimony for the Government on page 45, Mr. Francis, their expert, testified that for twenty-five or thirty years there has not been any ticket or paper writing sold representing a chance in any lottery. Describing it, he goes on to say, on page 46:

> "*Q.* That he would give to the vendor such a list of numbers as he wanted to play?
> "*A.* That was the general custom, I believe.
> "*Q.* Do you mean the man that was going to play would make out that number?
> "*A.* Sometimes he did and sometimes he just gave them numbers and they put it on a piece of paper—a great many of them would not even write the numbers.
> "*Q.* And did he give any money with it?
> "*A.* I presume so.
> "*Q.* You presume so?
> "*A.* Money or credit, possibly; I don't know. I was only stating the modus operandi. I didn't see those acts myself at all; I didn't state that I saw them."

So that we do not understand that if the bet was made between Hoff and the witness Harrison, and Harrison took it upon himself to write out numbers, that that constituted a ticket issued by anybody to represent an interest, chance or share dependent upon the event of a lottery. It would be nothing more or less than a memoranda of a bet made for Harrison's convenience, and made by himself, not at the solicitation of Hoff, but on Harrison's own motion. If the strict construction contended for by the Government is applied to this act, the only person who could be guilty, in the light of the testimony, would be the man Harrison.

Again, on pages 52 and 53, in the testimony of Mr. Pelton, called as an expert by the Government, to the question, "When a man goes to a vendor's policy shop and buys or chooses three numbers and invests ten cents, what is done by the vendor?"

"*A.* In all the shops, with one exception, that I am acquainted with, the patron finds a shelf or table, with such pieces of paper as this blank paper; he makes out his ticket, writing the official number of the system at the top; if it is the system that is in this case, if he wanted to bet in the Kentucky part of it, he would put a 'K' at the top, then write his three or more numbers under it and the amount paid below that, and make a duplicate of it; one he hands in with his money and the other he retains so as to compare with the official print when he returns to see if he has won. There is nothing given by the agent."

If it is claimed that the admission of Mr. Hoff is the basis of their claim to maintain this prosecution on, to wit, the testimony detailed by Mr. Pelton on page 54 in answer to the question put by the Court, "Just state what you did learn from personal observation from matters that came within your personal knowledge."

"*A.* I accompanied two officers who visited Mr. Hoff's shop about 11 o'clock, October 4th, last, where we found official prints, quite a package of them, and copies of policy plays, and where he admitted in my presence that he had accepted policy bets and sent them over the river to headquarters. He made this statement in my presence."

Now, then, if, in accordance with the testimony of Mr. France, it did not become a bet until the book was received at headquarters and the bet accepted, again we submit that the prosecution has failed, because there was not even a wager made.

If it is claimed that the bet was made between the vendor and Harrison, then the transaction was terminated and ended there, and the paper writing that Harrison made had no life. The whole question was a bet upon what numbers would come out in the drawing.

As was ruled in the case of France, et al. *v.* The United

States, U. S., 164, this does not come within the purview of the statute, and the indictment charged no offense.

If Harrison bet with Hoff that three certain numbers would come out at the next drawing, the bet can in no wise, if written on an hundred pieces of paper by Harrison, be construed into a ticket, for the ticket contemplated by this statute—the evil sought to be prevented—was from the persons interested in a lottery issuing any paper, certificate or instrument purporting to be or represent a ticket, chance, share or interest in or dependent upon the event of a lottery.

But can the question as presented by the peculiar language embraced in this statute "must not the instrument upon its face purport to represent a chance, share or interest; "if it fails to do that, is it an offense within the meaning of the statute? The fact that numbers written by Harrison may have been found in the possession of Edgar, who had just walked over the bridge from Newport to Cincinnati, and that such walking over the bridge constituted carrying across from one state to another, and the only evidence in support of that being the narative statement before referred to upon the part of Hoff. furnishes no evidence of guilty knowledge upon the part of Edgar. The presumption of law is, that Edgar's act was innocent. The presumption of law is not that Edgar knew the criminal nature of the paper; he may have come in possession thereof wholly innocent, aud the burden of the proof show that he had a guilty knowledge. No presumption can arise from the mere possession.

The Court erred in refusing to rule out the testimony of police officers Hill and Fricke pursuant to motion made on page 116 as to exhibits 7, 8, 9 and 10.

The Court erred clearly in not excluding the testimony of Edward Hill on pages 116, 117, 118, 119, 120 and 121. It was practically a discussion of the court to previous business of the defendants and the number of times previously that Edgar had been arrested, matters and things which in no sense have any concern with the allegations of the indictment.

The Court erred in admitting the testimony of D. Edwin Smith as to exhibits 11, 12, 13, 14 and 15, as more fully appears on page 126 of the Record. It bore no relation to the offense charged in the indictment; it was long after the occurrence, and should be only introduced as individual acts of the defendant Hoff, and at a period of time subsequent to the time mentioned in the indictment, and therefore a distinctive offense, and not admissible as proof that he committed the offense in question, or that either of his co-defendants had done so.

The testimony of Lieut. John Poppe, pages 130 and 131, was clearly incompetent. The Court permitted the Government to show by the witness the character of the defendant by reputation and appearances as they appeared to the witness, Poppe, and from what he saw and observed back as far as the year 1898. How this testimony could prove a conspiracy to carry tickets from Newport to Cincinnati, we do not understand. A man might keep a policy shop and yet not engage in the traffic of lottery tickets or carry the same from one state to another. To say that he was engaged in the business of writing policy, might increase the amount of prejudice against him in the minds of the jury—naturally, it would—it was, in a measure, putting his character in evidence. That he was in the policy business was no proof that he entered into a conspiracy, and such testimony could have only one object, one purpose—working prejudice in the minds of the jury against the defendant. It did not establish his guilt in one single iota.

Again, on page 146 of the testimony of Mr. Page, it appearing that several of the witnesses, employes of the Telegraph Company, had been called as witnesses by the Government concerning packages of paper writings or telegrams that were alleged to have been brought to the Western Union office by Mr. Francis, one of the defendants, on page 146, the question is put: "Mr. Page, are there any messages delivered to the Western Union Telegraph Company in this city, at about the hours of noon and 5 o'clock generally daily for transmission,

which are charged to an account and not paid for at the time?" and further on down to the conclusion of his testimony, the whole of it was incompetent down to and including page 150 or the end of his testimony, and the Court in the presence of the jury, on page 149 of the Record, put the question: "Mr. Page, two of the receivers in the employ of your company testified that the defendant, Francis, has for some time been bringing papers, rather a package, a sealed package, or sealed packages, and delivering them to the receivers, who under instructions from you as general manager, sent them up the chute to the operating room. I will ask you to tell the jury whether you know anything about that?" and then the answer thereto. Clearly the Court had no right to seek to intimidate the witness or to shatter his testimony by the fact that two receivers had testified to a statement of facts.

The question was "what was the fact within his knowledge" and such argument, particularly upon the part of the Court in the presence of the jury, we think was error.

The Court erred in refusing to exclude the testimony of the witness, J. T. Frazie, as requested by defendants below (See pages 155 to 162, inclusive).

The Court erred in admitting the testimony of J. B. Menke (See Record, page 162, in relation to Exhibit 17).

The fact that Charles Reilley may have gone upon the bond of Edgar for his appearance in the Police Court of Cincinnati on the fourth day of October, 1889, on a charge of promoting a scheme of chance was not evidence that was competent against the defendants to prove that they were engaged in the unlawful conspiracy charged in the indictment. The introduction of the bond in evidence, we submit, was prejudiced error and calculated to prejudice the defendants upon the trial below. (See Exhibit No. 17, Record, pages 229-230).

The Court erred in admitting the testimony of Exs. 6, 7, 8, 9, 10, as appears from the testimony of Mr. Bundy, pages 163 and 164, Record. There was no proof adduced identifying

them as ever having been used in any way by the defendants.

The Court erred in permitting A. L. France to give testimony as an expert (see pages 164, 165) relating to said exhibits. He expressly said he had no knowledge that in October, 1899, policy was played.

On page 166 the Court seeks to inquire as to the element of chance in policy. That was not at issue in this indictment and bore no relation thereto.

On pages 166 and 167 testimony concerning the Book, Ex. 19, was offered, and the same was admitted in evidence. There was not a particle of testimony that said book had ever been in the possession or under the control of either of the defendants, or that it had ever been seen by either of them, or had anything to do with the case except by way of imagination, and was, we think, incompetent.

Again, this book was found in 1898, two years before the commission of the alleged offense, and was in the custody of Police and District Attorney. Upon what theory this book could be used as evidence against an alleged conspiracy committed in October, 1899, we are at a loss to understand. The claim of the Government was that it explained the cipher telegrams. But how could that be, when the Government had possession thereof? Where is the testimony that it bore any relation to same? (See testimony, Record, pp. 168, 169 and 170).

The Court erred in permitting the examination of the witness William Fellows, pages 180, 181, 182, 183, 184 and 187, as to the cipher telegrams, because they were not sufficiently identified, and bore no relation to the case on trial. On pages 187, 188, 189 and 190, the Government again recalled the witness A. L. France, and sought to introduce the business engaged in and conducted by various parties not named in the indictment, not connected with the defendants named below, and without a single item of evidence showing any relation as

between Ben. Holland, R. B. Spencer or Henry Meyer. We think this was incompetent testimony, and should have been excluded.

On pages 188, 189, 190 and 191, the Court permitted A. L. France to give his opinion as to what the alleged cipher telegrams purported to be. There was no sufficient proof given that he had ever seen them, or any of a like character, prior or subsequent; he could not tell the jury what they contained; his testimony was a mere surmise based upon imagination. The witness admitted that he was unable to give the meaning of a single word, and the testimony, we think, should have been excluded.

TheCourt erred in refusing to exclude the testimony of Emig, on page 194, and, we think, erred in admitting the telegrams, as shown by Ex. 18. (See p. 194, Record.)

The Court in its charge to the jury goes on to define circumstantial evidence, and to give an illusrration as to what is meant and when the inference of guilty may be drawn, we do not think the rule is correctly stated

The Court leaves out the only essential element that the possession was very recent, and that the accused failed to give a satisfactory account of the possession, etc. (See on page 198 and 199). The Court assumes as a matter of fact that there was a lottery. This should be proven beyond a reasonable doubt; it is an essential element of the crime charged.

The Court, on p. 199, directly calls the attention of the jury to the previous arrest of Reilley in May, 1898, and directs practically from that the jury may infer he was engaged in the lottery business.

Again, on page 199, the Court puts the lottery as being carried on at room 64, St. Paul Building and without any proof, either directly or indirectly, of the fact, and practically calls the attention of the jury that the defendant, Francis, has charge of this lottery. The portion of the charge, following what the Court seems to be pleased to look upon as the part each played in carrying on the lottery or policy business, as

found on pages 198, 199 and 200.

The Court goes on to tell the jury what would be sufficient to convict of the conspiracy charged in the indictment. We think the Court misled the jury, and did not fully and clearly define the Law of Conspiracy. Granting that Francis did carry cipher messages to the telegraph office, that such cipher messages did relate to sending information all over the country, that certain numbers had been drawn, that act bore no relation to the conspiracy charges in this indictment.

The defendants might have engaged in the policy or lottery business, and each play his part without offending against the the statute, the gist of which was "the carrying of a ticket from one State to another."

The Court in its charge (see page 201, commencing with the second line of record):

> "If he knows there is a combination to do an unlawful act, to commit a crime, and that he has a part in it to play, and that there are others playing parts, and that others must play parts in order to accomplish the conspiracy, he is as guilty as if he knew the name, and had personal acquaintance with every one connected with the conspiracy *as if he knew precisely the part which every other man played.*"

Now, it was manifest from the testimony that Francis had no acquaintance with Hoff, Reilley, or Edgar; in fact, so far as the proof goes, he was a total stranger to them or either of them.

Why should he know that Edgar was to carry a ticket from Newport to Cincinnati? The proof does not show that it was any part of the business. Surely the business, as described by France, by Pelton and Harrison, was carried on entirely without such so called tickets. But, the Court follows, we think, with a misleading charge:

> "In a combination in which the co-operation of many numbers is necessary, covering a large field of territory, it would be impossible almost, that each

should know every other, and the part he plays. It is only necessary that he should know that there is a combination of which he is a part for the purpose of accomplishing a crime."

The fact that many persons in different States may have been engaged in this policy business, the jury might fairly assume made them co-conspirative, under this charge.

But before passing to that, there are some other matters I desire to call your attention to. Did these papers, or so called lottery tickets, which it is alleged defendants conspired to carry from Kentucky to Ohio, purport to represent interests of players in a drawing afterwards to take place? It is not necessary, gentlemen, that they should purport or show upon their face that they were tickets in a lottery giving an interest to the holder, in a drawing afterwards to take place, but their purport may be shown outside the papers. Now as to the evidence offered by the Govarnment upon that point, you will recall the evidence of France, who was introduced asan expert, to tell what they were, and the evidence of Harrison. that he wrote out his ticket and delivered one half of it to the agent, paid his money and held the duplicate—one of the duplicates, his evidence of the interest he had in the drawing that was to come off that day, and the evidence to which I have before referred as to the fact that the duplicate left with Hoff was afterwards found in possession of Edgar at the end of the bridge shortly after the play was made. If, from these facts, you are satisfied that it represented an interest in the drawing afterwards to take place, then, within the meaning of the law, it purported to represent the interest of the player in the drawing, although it did not so state upon its face.

This portion of the charge, we think, was clearly erroneous. Under the testimony of France, Pelton and Harrison, it seems perfectly clear that the paper written by Harrison, was no essential part of the play. that he could have orally declared he intended to bet on 10, 20 and 30, as illustrated by the witnesses, and paid his money; and his so declaring to the ven-

dor would have been a bet, as interpreted by the experts. So that the paper writing made by Harrison was not an act of the vendor, was not an act of Hoff, was not an act of Francis, nor was it an act of Reilley. Yet it is charged as the very overt act in the indictment that they had conspired to commit, a thing which only had existence in the mind of Harrison, and which was carried out by Harrison, the witness upon the part of the State, without any co-operation or assistance or knowledge upon the part of either of the defendants. Clearly, then, this was not an offense within the purview of the statute; clearly it is not proven that there was a conspiracy entered into by the defendants, with Harrison co-operating in any way; clearly it was not a ticket purporting to represent an interest in the lottery; for whether he had the paper or had it not, his bet, according to all the testimony, was upon the event as to whether or not the numbers named would come out in the drawing. For these reasons we submit that this part of the charge is certainly clearly erroneous.

The Court goes on again (on page 201 and 205 of the Record):

Now, then, to come to the act which it is alleged was done in furtherance of this conspiracy. There is evidence to show that five tickets, copies of which are set forth in the indictment, were, in fact, carried across the bridge from Newport, Kentucky, to Cincinnati, Ohio. That was an act to effect the purpose and object of the conspiracy. And if the jury, upon this evidence, should find that Edgar was a party to the alleged conspiracy, and carried these tickets, including the Harrison ticket, over the bridge from Kentucky to Ohio then I charge you that it would be an act in furtherance of the conspiracy, and it would be the act not only of Edgar, but of all the defendants; that is, if you find these four defendants were parties to the conspiracy charged in the indictment, to carry tickets across the bridge into Ohio, and that Edgar, one of them, did carry them over for the purposes of the lottery, in pursu-

ance of that understanding among them, then his act was an act of all four—the act of all.

This charge was misleading in several ways, and was not, we think, good law. There was not a particle of testimony that any of the paper writings mentioned in the indictment, except that which was written out by Harrison, had ever been played or attempted to be played by anybody. The five papers with numbers upon, assumed by the Court in its charge to be tickets, may have been, as described by the witness France, nothing whatever but the making of a paper without ever having been played or intended to be played. (See his testimony, page 169 of the Record).

And, in conjunction with the tickets mentioned, the Court goes on to say (including the Harrison ticket): over the bridge from Kentucky to Ohio; then I charge you "that it would be an act in furtherance of the conspiracy," etc. There is not a particle of proof that the defendants had conspired with Harrison or had any connection. It is clear that he was a hired detective seeking to prosecute them. The paper writing was of his own making, without any preconcerted action, and, therefore, it could have been no component part of a federation or conspiracy with the defendants. For this reason we think the *judgment below should be reversed.*

It is a settled rule of law that all evidentiary facts must be proved, and the existence of none of them can be presumed·

(Rule 3, p. 733, Burrill on Circumstantial Evidence).

Again, we think the Court erred in its charge upon the question of venue, as found upon page 202 of the Record.

When a man is charged with crime, gentlemen, and placed on trial, the presumption of law is that he is innocent, and before the jury would be warranted in finding him guilty of the charge upon which he is tried, the prosecution must establish his guilt beyond a reasonable doubt.

I have recited in your hearing the elements constituting the

charge in this case. Each element is essential to the charge. These elements of the charge must be established beyond a reasonable doubt in order to warrant a conviction.

We contend, that, under the Constitution of the United States such trial shall be held in the state where the said crime shall have been committed. The Court seems to have lost sight, in its charge to the jury, what was the ofiense of conspiracy, and what constituted its gist, and throughout his charge seems to have led the jury to think that the carrying of the tickets was the chief element of the crime.

If an illegal conspiracy be entered into within the limits of the United States, and within the jurisdiction of the Court, the crime is complete, and the subsequent act in pursuance thereof may be done anywhere.

(See Dealy *v.* U. S., 539.)

Language of Indictment.

It implies that the act was one contemplated by the conspiracy "according to" and was done in carrying out "in pursuance of" something which the conspiracy provided should be done—something which, when done, would tend to accomplish the purpose of the conspiracy.

(See Dealy *v.* U. S., 546.)

In pursuance thereof may have been done anywhere.

Justice Brewer. in giving the opinion of the Court (Dealy *v.* U. S., 152 U. S., 547), says : "The gist of the offense is the conspiracy."

As said by Justice Wood (in U. S. *v.* Britton, 108 U. S., 199—204): "This offense does not consist of both the conspiracy and the acts done to effect the object of the conspiracy, but of the conspiracy alone."

The provision of the statute that there must be an act done to effect the object of the conspiracy, merely affords a *locus*

penetentiae, so that, before the act done, either one or all of the parties may abandon their design. and thus avoid the penalty prescribed by statute."

Hence, if the conspiracy "was entered into within the limits of the United States and the jurisdiction of the Court, the crime was then complete and the subsequent overt act."

The charge of the Court upon the subject of a reasonable doubt, as found upon pages 202 and 203, with due respect to the Court below, seems to have been a direction to the jury in plain words that, in this case, any doubt that might have been raised in their minds would be an unreasonable doubt. We think the question should have been fairly left to the jury to determine, after looking into all the evidence. If that satisfied them of the defendants' guilt to so say. But, if not fully satisfied, but found there was only strong probabilities of guilt, they should have acquitted. But to tell the jury a reasonable doubt is a reasonable doubt is no fair way of presenting the matter to a jury. For it is laid down as an established rule in all the text books that, if the facts tending to show guilt may be fairly all reconciled with innocence, it is the duty of the jury to acquit; and the jury may readily have been mislead by the language of the Court below in his charge: "In the practical illustration of justice it is imposfible to remove all doubt of the guilt of the accused." "It would defeat the ends of justice to require anything of that kind."

Respectfully submitted,

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